

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ELISANDRO MENDOZA,	)	3:10-cv-00736-HDM-VPC
	)	
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
IMMIGRATION AND NATURALIZATION	)	
SERVICE and NEVADA ATTORNEY	)	
GENERAL,	)	
	)	
Defendants.		

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Petitioner is prisoner Elisandro Mendoza who was convicted of one count of sexual assault and sentenced to ten (10) years to life imprisonment in 2007 in Douglas County District Court in Nevada. See Docket # 1-1. He is now serving his prison sentence at Lovelock Correctional Center in Nevada. *Id.* His projected release date is June 16, 2016. *Id.* He claims that the United States Immigration and Naturalization Service (now part of the Department of Homeland Security and hereinafter referred to as such) has a detainer for removal (formerly termed deportation) against him. *Id.* Mendoza is not a United States citizen. *Id.* Mendoza's sexual

1 assault conviction would qualify as a removable criminal offense  
2 under 8 U.S.C. § 1227(a)(2). See also INA § 237(a)(2)(I); INA §  
3 101(a)(43); 8 U.S.C. § 1101(a)(43)(A). It would also make Mendoza  
4 inadmissible for purposes of naturalization under 8 U.S.C. §  
5 1182(a)(2)(A)(i)(I). See also INA § 212(a)(2)(A)(i)(I); INA §  
6 101(a)(43); 8 U.S.C. § 1101(a)(43)(A). Mendoza moves this court  
7 through a writ of habeas corpus for an order that would entitle him  
8 to invoke the Interstate Agreement on Detainers, 18 U.S.C.  
9 Appendix, and obtain a speedy deportation hearing. See Docket # 1-  
10 1. Alternatively, he asks to remain in prison and be granted U.S.  
11 citizenship. *Id.*

### 12 13 **I. Habeas Corpus**

14 Mendoza filed his request for relief as a 28 U.S.C. § 2254  
15 writ of habeas corpus. Mendoza's motion was filed in improper  
16 form. His motion should not be construed as a habeas petition.  
17 See *Argiz v. United States Immigration*, 704 F.2d 384 (7th Cir.  
18 1983) (petitioner-appellant filed similar motion under Interstate  
19 Agreement on Detainers, district court erroneously construed it as  
20 a petition for habeas corpus).

21 Mendoza's suit is against the I.N.S. and the Nevada Attorney  
22 General. He is currently in the custody of the Nevada State Prison  
23 system and not in the custody of the Department of Homeland  
24 Security (D.H.S.). He is not contesting his incarceration for his  
25 sexual assault conviction and he has not alleged that his  
26 constitutional rights in that context have been violated. Rather,  
27 his petition is directed at the immigration notice of detainer  
28 issued against him.

1       An immigration notice of detainer alone does not subject a  
2 prisoner to D.H.S. custody. See *Kurbegovic v. INS*, 1993 WL 128075  
3 (N.D.Cal. April 20, 1993) (incarcerated immigrants cannot obtain  
4 relief under a writ of habeas corpus because an INS notice of  
5 detainer alone does not subject a prisoner to INS custody); *Prieto*  
6 *v. Gluch*, 913 F.2d 1159, 1162 (6th Cir. 1990); *Orozco v.*  
7 *U.S.I.N.S.*, 911 F.2d 539, 541 (11th Cir. 1990); *Campillo v.*  
8 *Sullivan*, 853 F.2d 593, 595 (8th Cir. 1988); *United States ex. rel.*  
9 *Marcello v. District Director*, 634 F.2d 964, 969 (5th Cir. 1981).  
10 An immigration detainer does not purport to affect a prisoner's  
11 status as a sentenced offender, but merely notifies prison  
12 officials that a decision regarding his removal will be made by  
13 D.H.S. at some future date. *Campillo*, 853 F.2d at 595. The  
14 detainer does not alter a prisoner's status as a custodial detainee  
15 of the prison system. *Id.* It does not require the prison to "hold"  
16 a prisoner past the date of his incarceration. *Id.* Mendoza may not  
17 challenge the detainer by way of habeas corpus until he is placed  
18 in the custody of D.H.S., an event that will not occur until he is  
19 released from his present term of confinement. *Id.*

20       Where a petitioner is not in the custody of the Department of  
21 Homeland Security, there can be no habeas jurisdiction over  
22 petitioner's claims against the I.N.S. *Id.* Thus, Mendoza is not in  
23 custody for the purposes of a writ of habeas corpus and he has  
24 failed to state a claim against the I.N.S. under 28 U.S.C. § 2254.  
25 However, the court will consider Mendoza's petition as a motion for  
26 an order entitling him to invoke the Interstate Agreement on  
27 Detainers or, in the alternative, a petition for naturalization.

28

1 **II. Interstate Agreement on Detainers, 18 U.S.C. Appendix**

2 "The Sixth Amendment provides that 'in all criminal  
3 prosecutions, the accused shall enjoy the right to a speedy and  
4 public trial...' The Interstate Agreement on Detainers ... [is a]  
5 statutory means for effectuating this right. The Agreement provides  
6 for the speedy disposition of detainers based on 'untried  
7 indictments, informations, or complaints.'" *Argiz v. United States*  
8 *Immigration*, 704 F.2d 384 (7th Cir. 1983). A detainer is  
9 understood to be "a notification filed with the institution in  
10 which a prisoner is serving a sentence, advising that he is wanted  
11 to face criminal charges in another jurisdiction." *Id.*; see also  
12 Senate Report No. 91-1356, U.S. Code Cong. & Adm. News, 1970, Vol.  
13 3 at 4864-65.

14 Immigration deportation proceedings are not criminal  
15 proceedings. *Id.* They are civil in nature and are not conducted  
16 by a court of the United States. *Id.*; see also *Woodby v.*  
17 *Immigration & Naturalization Service*, 385 U.S. 276, 285 (1966).  
18 Therefore, an immigration charge cannot be classified as an  
19 "untried indictment, information, or complaint" within the meaning  
20 of the Agreement. *Id.* Accordingly, there is no relief available to  
21 Mendoza under the Interstate Agreement on Detainers.

22  
23 **III. Jurisdiction and Standing**

24 Even if Mendoza was entitled to relief, this court does not  
25 have the authority to grant it. Only the Attorney General of the  
26 United States has the authority to remove an alien. 8 U.S.C. §  
27 1231(a)(4)(A), (B). It is within the sole discretion of the  
28 Attorney General to remove an alien prior to the completion of his

1 prison sentence. 8 U.S.C. § 1231(a)(4)(A) (the Attorney General may  
2 not remove an alien who is sentenced to imprisonment until the  
3 alien is released from imprisonment); 8 U.S.C. § 1231(a)(4)(B) (the  
4 Attorney General is authorized to remove an alien, if the Attorney  
5 General determines that the alien is confined pursuant to a  
6 conviction for a nonviolent offense,<sup>1</sup> or the alien's removal is  
7 appropriate and in the best interest of the United States); *Tamayo*  
8 *v. Holder*, 2009 WL 2488032 (C.D.Cal. 2009) (court lacked authority  
9 to initiate deportation order); *United States v. Tinoso*, 327 F.3d  
10 864, 866 (9th Cir. 2003) (determination of whether an alien is  
11 subject to deportation resides in the Executive Branch).  
12 Furthermore, "a district court cannot sua sponte issue a  
13 deportation order without a request from the United States  
14 Attorney." *United States v. Marin-Castaneda*, 134 F.3d 551, 556 (3d  
15 Cir. 1998) (district court lacked authority to depart downward in  
16 sentence because of Attorney General's statutory power to deport  
17 alien before completion of prison term). Thus, this court does not  
18 have the authority to expedite Mendoza's removal proceedings.

19 In addition, 8 U.S.C. § 1231(a)(4)(D) states that imprisoned  
20 aliens have no private right to speedy removal. Specifically,  
21 aliens "imprisoned, arrested, or on parole, supervised release, or  
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23 <sup>1</sup> Mendoza was not convicted of a nonviolent offense. Sexual  
24 assault would be considered an aggravated felony under INA §  
25 101(a)(43) and 8 U.S.C. § 1101(a)(43)(A). It is also a crime of  
26 moral turpitude. See INA § 212(a)(2)(A)(i)(I); 8 U.S.C. §  
27 1182(a)(2)(A)(i)(I); INA § 237(a)(2)(I); 8 U.S.C. § 1227(a)(2)(A).  
28 Both subject aliens to removal. *Id.*

1 probation" cannot assert a cause or claim "under this paragraph  
2 against any official of the United States or of any State to compel  
3 the release, removal, or consideration for release or removal of  
4 any alien." 8 U.S.C. § 1231(a)(4)(D); *United States v. Aispuro*, 127  
5 F.3d 1133, 1134 (9th Cir. 1997) (an alien has no private right of  
6 action to compel the Attorney General to remove him from the United  
7 States prior to the completion of his sentence); *Tamayo*, 2009 WL  
8 2488032 (C.D. Cal. Aug. 12, 2009) (no private right of action to  
9 compel deportation).

10 For the foregoing reasons, Mendoza has also failed to state a  
11 claim against the Nevada Attorney General. See 8 U.S.C. §  
12 1231(a)(4)(D) (incarcerated alien cannot assert a cause or claim  
13 against any official of any State to compel his release, removal,  
14 or consideration for release or removal).

#### 16 **IV. Naturalization**

17 Lastly, this court does not have the authority to grant  
18 Mendoza U.S. citizenship under the circumstances. "[T]he power to  
19 make someone a citizen of the United States has not been conferred  
20 upon the federal courts, like mandamus or injunction, as one of  
21 their generally applicable equitable powers." *INS v. Pangelinan*, 486  
22 U.S. 875, 883-84 (1988). The federal courts' responsibility in  
23 exercising the naturalization power, which the Constitution  
24 delegates to Congress through U.S. Const. art. I, § 8, cl. 4, must  
25 "be performed in strict compliance with the terms of an authorizing  
26 statute which says that '[a] person may be naturalized ... in the  
27 manner and under the conditions prescribed in this subchapter, and  
28 not otherwise.'" 486 U. S. at 884 (quoting 8 U.S.C. § 1421(d)); see

1 also *United States v. Ginsberg*, 243 U. S. 472, 474 (1917) (An alien  
2 who seeks political rights as a member of this Nation can  
3 rightfully obtain them only upon terms and conditions specified by  
4 Congress. Courts are without authority to sanction changes or  
5 modifications; their duty is rigidly to enforce the legislative  
6 will with respect to a matter so vital to the public welfare.).  
7 "'Once it has been determined that a person does not qualify for  
8 citizenship, . . . the district court has no discretion to ignore  
9 the defect and grant citizenship'" absent a constitutional  
10 violation in the process. *Fedorenko v. United States*, 449 U.S. 490  
11 (1981) (citation omitted); see also 8 U.S.C. § 1252(a)(2)(C)  
12 ("Notwithstanding any other provision of law ... no court shall  
13 have jurisdiction to review any final order of removal against an  
14 alien who is removable by reason of having committed a criminal  
15 offense covered in" 8 U.S.C. § 1182 (a)(2) or 1227 (a)(2)(A)(iii),  
16 (B), (C), or (D) or 1227 (a)(2)(A)(I) or (ii).); REAL ID Act of  
17 2005, Pub.L. No. 109-13, 119 Stat. 231, 310-11 (eliminating federal  
18 habeas corpus jurisdiction over final orders of removal in favor of  
19 petitions for review that raise constitutional claims or questions  
20 of law). The relief Mendoza seeks is not available.

21 Mendoza's motion is DENIED.

22  
23 It is so ORDERED.

24 DATED: This 9th day of December, 2010.

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26   
27 UNITED STATES DISTRICT JUDGE  
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